

**COURT OF COMMON PLEAS
FOR THE STATE OF DELAWARE**
WILMINGTON, DELAWARE 19801

John K. Welch
Judge

June 7, 2010

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Re: *State of Delaware v. Michael T. Kumbier*
Case No.: 0906025598

Date Submitted: May 26, 2010

Date Decided: June 7, 2010

MEMORANDUM OPINION

Dear Counsel:

Trial in the above captioned matter took place on Wednesday, May 26, 2010 in the Court of Common Pleas, New Castle County, State of Delaware.

Defendant, Michael T. Kumbier (“Kumbier” or “defendant”) was charged with one Count filed with the Clerk of the Court by the Attorney General of an alleged a violation of §2302 of Title 23 “Operating a Vessel or Boat Under the Influence.” The relevant charging documents alleged that Michael T. Kumbier “. . .on or about the 27th day of June 2009 in the County of New Castle, State of Delaware, did operate a vessel or boat on Delaware waters while under the influence of alcohol or any drug, or a combination of drugs and alcohol or with a prohibited alcohol content as set

forth in §2302 of Title 23, or when the person's blood contains an illicit or recreational drug as set forth in §2302 of Title 23.

Following the receipt of documentary evidence and sworn testimony the Court reserved decision. This is the Court's Final Decision and Order.

I. Procedural Posture.

Several State witnesses appeared and presented sworn testimony at trial. First, Corporal Casey Zolper ("Corporal Zolper") was sworn and testified. The Court received into evidence by stipulation State's Exhibit No.: 2 which were the Intoxylizer logs for CMI Intoxylizer Model 5000EN Certification Sheet dated June 8, 2009 that certified Julie Willie, State Police Forensic Chemist checked the pre and post-calibration and operation of Intoxylizer 68-011961 located at Delaware State Police Troop 2. These documents were received into evidence with no objection by Mr. Denney.

Second, Officer Patrick Wenk appeared for trial and was released following the stipulation of these intoxylizer logs into evidence by the defendant.

Third, Officer Warren White, a seasonal DNREC Enforcement Agent appeared and testified at trial for the State.

Also received into evidence was a package of three (3) exhibits offered by the State, marked as State's Exhibit No.1, which indicated Corporal Zolper received a Certificate from the University of North Carolina as a DUI Instructor from the National Highway Traffic Safety Administration Approved Instructor Training in

Horizontal Gaze Nystagnus Sobriety Test Procedures in Charleston, South Carolina dated January 12-16, 2009. The second part of State's Exhibit No. 1 was a document indicating Corporal Zolper has completed successfully the 24 hour training course DUI Standardized Field Sobriety Testing ((Approved by the National Highway Traffic Safety Administration – NHTSA) in Charleston, South Carolina dated January 7-9, 2009. Third, according to part three of State of Delaware's Exhibit No. 1 received into evidence was a Boating Under the Influence SFST Trainer Development Program from the Delaware Fish & Wisconsin Wildlife Enforcement indicating Corporal Zolper completed 24 hours of the NASBLA course on Boating Under the Influence SFST Trainer Development in Richmond, Virginia dated July 7-9, 2009.

II. The Facts.

The facts indicate that Corporal Zolper with ten (10) years experience as a DNREC Patrol Officer statewide, on June 27, 2009 at 2147 hours, testified that he observed the defendant 300 yards away from his patrol vessel, driving his vessel on the date, time and place charged in the Information. According to Corporal Zolper, he observed the defendant's vessel not using navigational running lights on June 27, 2009 at 9:40 p.m. on the C & D Canal. He observed the boat perform a 45 degree turn and quickly move off an area of rocks into the C & D Canal where the vessel had struck the rocks. The defendant's boat then quickly changed into reverse and moved backwards abruptly and proceeded out to the C&D Canal. Three DNREC Officers were in Corporal Zolper's DNREC vessel accompanied him on his patrol vessel.

Corporal Zolper then used his spotlight and “blue light” to move up on the defendant’s vessel. While it was still running, he testified he actually observed the defendant operating his vessel behind the vessel’s steering wheel. He identified the defendant in the courtroom. He pulled alongside defendant’s vessel; stopped and then boarded the defendant’s vessel. He performed various boat field tests described in the record including, but not limited to the “Float Field Test”, “Alphabet”, “25 – 1 Backward Counting Test”, “Finger to Nose Test”, “Horizontal Gaze Test”, and “Palm Pat Test,” all of which the defendant failed. He noticed beer cans scattered throughout the vessel on the floor. There was a large number of Miller and Budweiser cans on the floor of defendant’s vessel. The defendant had bloodshot, watery eyes, and slurred speech. The defendant also had a strong odor of alcoholic beverages coming from his person.

Corporal Zolper asked defendant to produce a whistle and horn, as well as his registration card. Corporal Zolper then took the defendant to shore in his vessel and attempted to perform certain NHTSA approved field coordination tests. Corporal Zolper asked one of the passengers to take the defendant’s boat to dock. The defendant failed the “Horizontal Gaze Nystagnus Test” with all six clues while on the boat. When the NHTSA approved tests were administered on shore, Corporal Zolper said the defendant was too intoxicated to perform the NHTSA approved “Walk and Turn” and “One Legged Stand.” For the safety of the defendant, Corporal Zolper testified did not perform any more NHTSA approved field

coordination tests. According to Corporal Zolper, the defendant failed the “Walk and Turn Test” with two clues because the defendant couldn’t complete the field coordination tests because of his problems standing upright and degree of intoxication.

On cross-examination Corporal Zolper testified the boat field tests administered to the defendant are not NHTSA approved.

Officer Warren White (“Officer White”) testified at trial. He identified the defendant in the courtroom. He testified he actually observed the defendant behind the vessel’s wheel operating the vessel owned by defendant. Officer White also observed the defendant’s “slurred speech”, “bloodshot eyes”, the “smell of a strong odor of alcoholic beverage” and testified the defendant appeared to be “intoxicated” or “inebriated”. Officer White observed the vessel running as he approached and according to Officer White. The defendant told him “I was operating the vessel, but not at the time it hit the rocks.” Officer White testified he never saw or observed any other person than the defendant actually operating the vessel other than the defendant. When he saw the defendant Officer White testified the defendant was behind the vessel steering the vessel while the boat was running.

The defense presented its case-in-chief. The defense presented several fact witnesses, including the defendant, who moved into evidence a picture of the boat, marked as Defendant’s Exhibit No.: 1. It was received into evidence unopposed. The exhibit was marked depicted the occupants of the boat were located at the time

of the stop by DNREC police. Several of the defendant's friends testified including Mr. Charlie Dunlop and Ronald R. Leidy. Several conflicting statements were received into evidence, including whether the defendant was actually driving to the restaurant. All testified that a passenger named Tommy was actually operating the defendant's vessel on June 27, 2009 because Tommy agreed to not consume any alcoholic beverages. All were friends of the defendant who had known him from some time. All witnesses maintained their boats at Summit North Marina at Chesapeake City and testified they had known the defendant for various periods of time. All three (3) witnesses testified that there was a conversation with the defendant before they went to the restaurant indicating they would go out for dinner and return to the marina later.

The defendant's wife took the stand and testified. Mrs. Francis Kumbier ("Mrs. Kumbier") is married to the defendant. She spoke with him on June 27, 2009. The defendant agreed that he could go to the restaurant on the boat with his friends if Tommy drove the vessel. Mrs. Kumbier stayed behind and visited with friends. She has been married to the defendant for thirty-five ("35") years, she was not in the vessel at the time it was stopped by DNREC Officers on the date, time and place charged in the Information.

III. The Law.

TITLE 23. Navigation and Waters

CHAPTER 23. OPERATION OF A VESSEL OR BOAT WHILE UNDER THE INFLUENCE OF INTOXICATING LIQUOR AND/OR DRUGS

§ 2301. Definitions.

(a) "Alcohol concentration of 0.08 or more" shall mean:

(1) An amount of alcohol in a sample of a person's blood equivalent to 0.08 or more grams of alcohol per 100 milliliters of blood; or

(2) An amount of alcohol in a sample of a person's breath equivalent to 0.08 or more grams per 210 liters of breath.

(b) "Chemical test" or "test" shall include any form or method of analysis of a person's blood, breath or urine for the purposes of determining alcohol concentration or the presence of drugs which is approved for use by the Forensic Sciences Laboratory, Office of the Chief Medical Examiner, the Delaware State Police Crime Laboratory, any state or federal law enforcement agency, or any hospital or medical laboratory. It shall not, however, include a preliminary screening test of breath performed in order to estimate the alcohol concentration of a person at the scene of a stop or other initial encounter between a law enforcement officer and the person.

(c) "Operating a vessel or vessel operation" shall include driving, operating or having actual physical control of a vessel or boat. (Emphasis supplied).

(d) "Prior or previous offense" shall mean:

(1) A conviction pursuant to this chapter, or a similar statute of any state, local jurisdiction or the District of Columbia, within 5 years immediately preceding the date of the present offense; or

(2) A conviction, under a criminal statute encompassing death or injury caused to another person by the person's operation of a vessel, where operating a vessel under the influence or with a prohibited alcohol concentration was an element of the offense.

For the purpose of computing the periods of time set out in § 2305 of this title, the period shall run from the date of the commission of the prior or previous offense to the date of the commission of the charged offense. In any proceeding under § 2305 of this title, a person may not challenge the validity of any prior or previous conviction unless that person first successfully challenges the prior or previous conviction in the court in which the conviction arose and provides written notice of the challenge in the present proceeding to the prosecution at least 20 days before trial.

(e) "Underway" shall be defined as any vessel which is not at anchor or made fast ashore.

(f) "Vessel" shall mean every device in, upon or by which any person may be transported upon the water excepting devices moved by human power.

(g) "While under the influence" shall mean that the person is, because of alcohol or drugs or a combination of both, less able than the person would ordinarily have been, either mentally or physically, to exercise clear judgement, sufficient physical control, or due care in the operation of a vessel or boat.

67 Del. Laws, c. 216, § 2; 70 Del. Laws, c. 565, § 1; [75 Del. Laws, c. 437, § 1](#);

§ 2302. Operation of a vessel or boat while under the influence of intoxicating liquor and/or drugs.

(a) No person shall motor, sail, row, operate, command or have actual physical control of any vessel or boat underway on Delaware waters:

(1) When the person is under the influence of alcohol;

(2) When the person is under the influence of a drug;

(3) When the person is under the influence of any combination of alcohol and any drug;

(4) When the person's alcohol concentration is 0.08 or more; or

(5) When the person's alcohol concentration is, within four hours after the time of vessel operation, 0.08 or more.

(b) Any person charged under subsection (a) of this section whose blood alcohol concentration is eight one-hundredths of 1% or more by weight as shown by a chemical analysis

of a blood, breath or urine sample taken within 4 hours of the alleged offense shall be guilty of violating subsection (a) of this section. This provision shall not preclude a conviction based on other admissible evidence.

(c) The fact that any person charged with violating this section is or has been legally entitled to use alcohol or a drug shall not constitute a defense against any charge of violating this section.

(d) It shall be an affirmative defense to a prosecution premised on paragraph (a)(5) of this section if the person proves by a preponderance of evidence that the person consumed a sufficient quantity of alcohol after the time of actual vessel operation and before any sampling to cause the person's alcohol concentration to exceed 0.08. Such evidence shall not be admitted unless notice of this defense is given to the prosecution at least 20 days before trial.

(e) The charging document may allege a violation of subsection (a) of this section without specifying any particular paragraph of subsection (a) of this section and the prosecution may seek conviction under any of the paragraphs of subsection (a) of this section.

67 Del. Laws, c. 216, § 2; 70 Del. Laws, c. 565, §§ 2, 3; [75 Del. Laws, c. 437, §§ 1, 2.](#)

§ 2303. Consent to submit to chemical test.

(a) Any person who motors, sails, rows, commands, operates or has actual physical control of a vessel or boat underway on the waters of this state shall be deemed to have given consent, subject to this section and § 2302 of this title, to a chemical test or tests of the person's blood, breath and/or urine for the purpose of determining the presence of alcohol or a drug or drugs. The testing may be required of a person when an officer has probable cause to believe the person is in violation of § 2302 of this title or a local ordinance substantially conforming thereto.

(b) At the time that a chemical test specimen is required, the person may be informed that if testing is refused, the person shall be prohibited from operating a vessel upon Delaware's waters for a period of 1 year.

(c) If there are reasonable grounds to believe that there is impairment by a drug or drugs which are not readily subject

to detection by a breath test, a blood and/or urine test may be required even after a breath test has been administered.

(d) Alternative tests; physical incapacity. -- If for any reason a person is physically unable to supply enough breath or complete the chemical test, the person shall submit to other chemical tests as designated by the officer, subject to the requirements of subsection (a) of this section. Any person who is unconscious or who is otherwise in a condition rendering the person incapable of refusal shall be deemed to not have withdrawn the consent provided in this section and any test may be performed as provided in subsection (a) of this section.

(e) Refusal to submit as admissible evidence. -- Upon any trial of any action or proceeding arising out of the acts alleged to have been committed by any person while in violation of § 2302 of this title, the court may admit evidence of the refusal of such person to submit to a chemical test of the person's breath, blood or urine.

(f) Admissibility in evidence of results of chemical test -- For purposes of a conviction premised upon § 2302(a) of this title or any proceeding pursuant to this code in which an issue is whether a person was operating a vessel while under the influence, evidence establishing the presence and concentration of alcohol or drugs in the person's blood, breath or urine shall be relevant and admissible. Such evidence may include the results from tests of samples of the person's blood, breath or urine taken within four hours of operating the vessel or at some later time. In any proceeding, the resulting alcohol or drug concentration reported when a test, as defined in § 2301(b) of this title, is performed shall be deemed to be the actual alcohol or drug concentration in the person's blood, breath or urine without regard to any margin of error or tolerance factor inherent in such tests.

(g) Evidence of an alcohol concentration of 0.05 or less in a person's blood, breath or urine sample taken within 4 hours of operating a vessel and tested as defined in § 2301(b) of this title is prima facie evidence that the person was not under the influence of alcohol within the meaning of this chapter. Evidence of an alcohol concentration of more than 0.05 but less than 0.08 in a person's blood, breath or

urine sample taken within four hours of operating a vessel and tested as defined in § 2301(b) of this title shall not give rise to any presumption that the person was or was not under the influence of alcohol, but such fact may be considered with other competent evidence in determining whether the person was under the influence of alcohol.

(h) Evidence obtained through a preliminary screening test of a person's breath in order to estimate the alcohol concentration of the person at the scene of a stop or other initial encounter between a law enforcement officer and the person shall be admissible in any proceeding to determine whether probable cause existed to believe that a violation of this code has occurred. However, such evidence shall not be admissible in the determination of guilt under this section.

(i) Nothing in this section shall preclude conviction of an offense defined in this chapter based solely on admissible evidence other than the results of a chemical test of a person's blood, breath or urine to determine the concentration or presence of alcohol or drugs.

(j) A jury shall be instructed by the court in accordance with the applicable provisions of this section in any proceeding pursuant to this chapter in which an issue is whether a person was operating a vessel while under the influence.

(k) For the purpose of introducing evidence of a person's alcohol concentration pursuant to this section, a report signed by the Forensic Toxologist, Forensic Chemist or State Police Forensic Analytical Chemist who performed the test or tests as to its nature is prima facie evidence, without the necessity of the Forensic Toxologist, Forensic Chemist or State Police Forensic Analytical Chemist personally appearing in court:

- (1) That the blood delivered was properly tested under procedures approved by the Forensic Sciences Laboratory, Office of the Chief Medical Examiner or the Delaware State Police Crime Laboratory;
- (2) That those procedures are legally reliable;
- (3) That the blood was delivered by the officer or persons stated in the report; and
- (4) That the blood contained the alcohol therein stated.

(l)(1) Any report introduced under subsection (k) of this section must:

- a. Identify the Forensic Toxologist, Forensic Chemist or State Police Forensic Analytical Chemist as an individual certified by the Forensic Sciences Laboratory, Office of the Chief Medical Examiner, the Delaware State Police Crime Laboratory or any county or municipal police department employing scientific analysis of blood, as qualified under standards approved by the Forensic Sciences Laboratory, Office of the Chief Medical Examiner or the Delaware State Police Crime Laboratory to analyze the blood;
- b. State that the person made the analysis of the blood under the procedures approved by the Forensic Sciences Laboratory, Office of the Chief Medical Examiner or the Delaware State Police Crime Laboratory; and
- c. State that the blood, in the person's opinion, contains the resulting alcohol concentration within the meaning of this chapter.

Nothing in this section precludes the right of any party to introduce any evidence supporting or contradicting the evidence contained in the report entered pursuant to subsections (k) and (l) of this section.

(2) For purposes of establishing the chain of physical custody or control of evidence defined in this section which is necessary to admit such evidence in any proceeding, a statement signed by each successive person in the chain of custody that the person delivered it to the other person indicated on or about the date stated is prima facie evidence that the person had custody and made the delivery stated, without the necessity of a personal appearance in court by the person signing the statement, in accordance with the same procedures outlined in § 4331(3) of Title 10.

(3) In a criminal proceeding, the prosecution shall, upon written demand of a defendant filed in the proceedings at least 15 days prior to the trial, require the presence of the Forensic Toxologist, Forensic Chemist, State Police Forensic Analytical Chemist or any person necessary to establish the chain of custody as a witness in the proceeding. The chain of custody or control of evidence defined in this section is established when there is evidence

sufficient to eliminate any reasonable probability that such evidence has been tampered with, altered or misidentified.

(m) The informing or failure to inform the accused concerning the implied consent provision shall not affect the admissibility of such results in any prosecution for a violation of § 2302(a) of this title.

(n) The doctor-patient privilege shall not apply to the disclosure to law-enforcement personnel nor the admissibility into evidence in any criminal proceeding of the results of a chemical test of a person's blood, breath or urine for the purpose of determining the alcohol or drug content of the person's blood irrespective of whether such test was done at the request of a treating physician, other medical personnel or a peace officer.

67 Del. Laws, c. 216, § 2; 70 Del. Laws, c. 186, § 1; 70 Del. Laws, c. 565, §§ 4, 5; [75 Del. Laws, c. 437, § 1](#);

§ 2304. Refusal to submit to chemical test.

(a) If any person requested refuses to submit to a chemical test pursuant to § 2303 of this title, after being informed of the penalty for said refusal, that person shall be prohibited from operating a vessel upon Delaware waters for a period of 1 year. This prohibition shall begin the day of said refusal.

(b) The Secretary of the Department shall notify in writing said persons of this prohibition and its duration and shall maintain a list of these individuals.

(c) Operation upon Delaware waters during the period of prohibition provided in subsection (a) of this section shall be punished by a fine of not less than \$500 nor more than \$2,000 and/or 30 days in jail.

67 Del. Laws, c. 216, § 2.;

§ 2305. Penalties; jurisdiction.

Whoever is convicted of a violation of § 2302 of this title shall:

(1) For the 1st offense, be fined not less than \$200 nor more than \$1,000, or imprisoned not less than 60 days nor more than 6 months, or both.

(2) For a second offense occurring within 5 years from a prior offense, be fined not less than \$500 nor more than

\$2,000 and imprisoned not less than 60 days nor more than 18 months. No person sentenced under this subsection shall receive a suspended sentence.

(3) For a third offense occurring within 5 years from a prior offense, be guilty of a Class G Felony, be fined not less than \$1,000 nor more than \$3,000 and imprisoned not less than 1 year nor more than 2 years. The provisions of § 4205(b)(7) or § 4217 of Title 11 or any other statute to the contrary notwithstanding, the first 3 months of the sentence shall not be suspended, but shall be served at Level V and shall not be subject to an early release, furlough or reduction of any kind. No conviction for violation of this chapter for which a sentence is imposed pursuant to this subsection shall be considered a predicate felony conviction for sentencing pursuant to § 4214 of Title 11. No offense for which sentencing pursuant to this subsection is applicable shall be considered an underlying felony for a murder in the first degree charge pursuant to § 636(a)(2) of Title 11.

(4) For a fourth or subsequent offense occurring any time after three prior offenses, be guilty of a Class E Felony, be fined not less than \$2,000 nor more than \$6,000 and imprisoned not less than 2 years nor more than 5 years. The provisions of this title or any other statute notwithstanding, a court may consider prior offenses outside a five-year period for sentencing pursuant to this subsection. The provisions of § 4205(b)(5) or § 4217 of Title 11 or any other statute to the contrary notwithstanding, the first 6 months of the sentence shall not be suspended, but shall be served at Level V and shall not be subject to any early release, furlough or reduction of any kind. No conviction for violation of this chapter for which a sentence is imposed pursuant to this subsection shall be considered a predicate felony conviction for sentencing pursuant to § 4214 of Title 11. No offense for which sentencing pursuant to this subsection is applicable shall be considered an underlying felony for a murder in the first degree charge pursuant to § 636(a)(2) of Title 11.

(5) In addition to the penalties otherwise authorized by this section, a person convicted of a violation of § 2302(a) of this title, committed while a person who has not yet

reached that person's 17th birthday is on or in the vessel shall:

a. For the first offense, be fined an additional minimum of \$200 and not more than an additional \$1,000 and sentenced to perform a minimum of 40 hours of community service in a program benefiting children.

b. For each subsequent like offense, be fined an additional minimum of \$500 and not more than an additional \$2,000 and sentenced to perform a minimum of eighty hours of community service in a program benefiting children.

c. Violation of this subsection shall be considered as an aggravating circumstance for sentencing purposes for a person convicted of a violation of § 2302(a) of this title. Nothing in this subsection shall prevent conviction for a violation of both § 2302(a) of this title and any offense as defined elsewhere by the laws of this state.

d. Violation of or sentencing pursuant to this subsection shall not be considered as evidence of either comparative or contributory negligence in any civil suit or insurance claim, nor shall a violation of or sentencing pursuant to this subsection be admissible as evidence in the trial of any civil action.

(6) A person who has been convicted of prior or previous offenses under this chapter need not be charged as a subsequent offender in the complaint, information or indictment against the person in order to render the person liable for the punishment imposed by this chapter on a person with prior or previous offenses under this chapter. However, if at any time after conviction and before sentence, it shall appear to the Attorney General or to the sentencing court that by reason of such conviction and prior or previous convictions, a person should be subjected to subsection (3) or (4) of this section, the Attorney General shall file a motion to have the defendant sentenced pursuant to those provisions. If it shall appear to the satisfaction of the court at a hearing on the motion that the defendant falls within subsection (3) or (4) of this section, the court shall enter an order declaring the offense for which the defendant is being sentenced to be a felony and shall impose a sentence accordingly.

(7) The Justice of the Peace Courts shall have jurisdiction for violations of this chapter, except those offenses which must be sentenced pursuant to subsection (3) or (4) of this section.

(8) In addition to the penalties prescribed in subsections (2), (3) and (4) of this section, anyone convicted of a subsequent like offense shall be ordered to complete a program of education or rehabilitation which may include inpatient treatment and be followed by such other programs as established by the training facility, not to exceed a total of 15 months, and pay a fee not to exceed the maximum fine.

67 Del. Laws, c. 216, § 2; 70 Del. Laws, c. 186, § 1; 70 Del. Laws, c. 565, § 6.;

§ 2306. Enforcement of chapter.

In addition to any other powers of arrest, any law enforcement officer is hereby authorized to arrest without warrant any person who the officer has probable cause to believe has violated the provisions of this chapter, regardless of whether the alleged violation was committed in the presence of such officer. This authority to arrest extends to any hospital or other medical treatment facility located beyond the territorial limits of the officer's jurisdiction provided there is probable cause to believe that the violation of this chapter occurred within the officer's jurisdiction. This authority to arrest also extends to any place where the person is found within 4 hours of the alleged operation of a vessel if there is reason to believe the person has fled the scene of an accident in which the person was involved, and provided there is probable cause to believe that the violation of this chapter occurred within the officer's jurisdiction.

67 Del. Laws, c. 216, § 2; 70 Del. Laws, c. 565, § 7.;

§ 2307. Persons qualified to administer tests.

Any person qualified under § 2746 of Title 21 shall be qualified for the purposes of this chapter to withdraw blood from a person submitting to a chemical test or obtaining a specimen of breath or urine under this chapter.

67 Del. Laws, c. 216, § 2.;

§ 2308. Disposition of vessel and property.

(a) Where the only person on a vessel is an individual suspected of violating this chapter, the following procedure shall apply:

- (1) The vessel shall be towed to a safe port and be secured.
- (2) An inventory of the vessel's contents shall be made. The occupant of the vessel shall sign the inventory and receive a copy thereof.
- (3) All contents of the vessel shall be secured on the boat whenever possible. If it is not possible to secure the contents on the vessel, the contents must be secured safely elsewhere.
- (4) The vessel shall remain secured until the vessel's occupant or the occupant's designee is capable of assuming responsibility for the vessel.

(b) Where more than 1 person is on a vessel which has been stopped for a suspected violation of this chapter, the following procedure shall apply:

- (1) The vessel shall be towed to a safe port and be secured unless there is a competent person on the vessel who is designated by the operator to take responsibility for the vessel.
- (2) If there is no competent person on the vessel to operate it, the procedures set forth in subsection (a) of this section shall apply.

(c) A vessel shall be considered at "a safe port and be secured" if:

- (1) The vessel is placed at a marina under a bailment contract with the marina operator, at the owner's expense. The marina operator must be paid a storage fee by the owner or operator upon release of the vessel. When a vessel is placed at a marina, the marina operator shall sign and receive a copy of the inventory of the vessel; or
 - (2) The vessel is transported to a state-operated facility.
- (d) Where a vessel which has been stopped for a suspected violation of this chapter has been damaged or has caused damage as a result of its operation in violation of the chapter, the vessel may, at the direction of the investigating agency, be removed and impounded for evidentiary

purposes. The vessel shall be inventoried pursuant to subsection (a)(2) of this section, but the vessel shall not be released until evidentiary processing is completed.

67 Del. Laws, c. 216, § 2; 70 Del. Laws, c. 186, § 1.;

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IV. Opinion and Order.

Following the introduction of the BAC reading of 0.16, what is left for the Court to determine is whether the defendant, Michael T. Kumbier actually did operate or have physical control of his vessel or boat on Delaware waters on the date, time and place charged in the Information. The BAC reading received into evidence at trial without objection was 0.16. Carefully scrutinizing the credibility of the fact witnesses and considering at least the State's argument that the remaining fact witness who was allegedly driving the boat, Tommy, did not appear for trial, the Court must balance the credibility of the all fact witnesses to determine if the State has, in fact,

met the threshold of proof beyond a reasonable doubt, 11 *Del.C.* §301 that the defendant was the individual operating the vessel or boat on the date, time and place in the Information.

The defendant testified that on the date in question that he had been drinking at the restaurant. His BAC introduced at trial was 0.16 with no objection. All of the other fact witnesses offered by the defense had been drinking the night in question. According to Officer White, the defendant told him at the time of the stop, which was a contemporaneous statement, that he wasn't driving the boat at the time it hit the rocks. Two (2) sworn police officers testified they actually observed the defendant driving the vessel in question and was behind the vessels wheel on June 27, 2009 at 2147 hours. The Court notes that the defendant never objected to performing boat field tests; NHTSA field tests at shore; or the Intoxylizer 5000 tests at the Troop.

Looking at the totality of circumstances and considering the testimony of all the fact witnesses at trial, this Court finds the State has met the predicate element proof beyond a reasonable doubt that the defendant was driving the vessel in the date, time and place in the Information. Pursuant to 29 *Del.C.* §2301(c), the Court finds the defendant was operating the vessel by driving, operating, or having physical control of the vessel on the date, time and place in the Information. Two (2) DNREC officers testified he was actually behind the vessels wheel. As such, the State has moved into evidence, without objection, the BAC Reading of 0.16, the Court finds beyond a

reasonable doubt that he was the actual operator of the vessel on the date, time and place charged in the Information and adjudicates the defendant **GUILTY** of the instant charge.

The Court shall schedule this matter for sentencing at the earliest convenience of the Court and counsel.

IT IS SO ORDERED this 7th day of June, 2010.

John K. Welch
Judge

/jb
cc: Diane Healy, Case Manager
CCP, Criminal Division